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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LATONYA FINLEY,

Plaintiff and Appellant,

v.

LASALLE NATIONAL BANK
ASSOCIATION, as Trustee, etc.,

Defendant and Respondent.

A128223

(Alameda County
Super. Ct. No. RG08410231)

Appellant Latonya Finley contends that she was fraudulently induced to take out an unconscionable mortgage loan on her real property, secured by a deed of trust; that a notice of default on the property was wrongfully filed; and that the property was improperly sold at a nonjudicial foreclosure sale. The trial court sustained a demurrer to Finley's first amended complaint, without leave to amend. We affirm.

FACTS AND PROCEDURAL BACKGROUND

As this appeal arises from an order sustaining a demurrer, we assume, solely for the purpose of determining whether Finley's first amended complaint¹ stated a cause of action, that the facts pleaded in the complaint are true. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Those facts, supplemented by matters of which the trial court took judicial notice, may be summarized as follows. Finley owned a parcel of real property (the property) in Oakland. In April 2006, Finley refinanced the property

¹ All further references in this opinion to the complaint are to the first amended complaint unless otherwise noted.

through Resmae, a mortgage banker, and executed a promissory note and deed of trust to secure a loan in the amount of \$600,000. (Resmae was named as a defendant in Finley's original complaint in this action, but was not named as a defendant in the first amended complaint, and is not a party to this appeal. It apparently declared bankruptcy and was sold to another entity.) On April 25, 2006, Finley executed a deed of trust transferring the property, as a gift, to a nonprofit corporation named Future Awareness, which is not a party to this case.

In mid-December 2006, Finley tendered a sum of money sufficient to pay the amount then due on the mortgage.² Finley does not allege that she made or tendered any payments after that date. A notice of default was recorded against the property on April 6, 2007. On May 10, 2007, Resmae assigned the deed of trust securing Finley's mortgage to respondent, which was designated as follows in the assignment: "LaSalle Bank National Association, as Trustee and Custodian for Merrill Lynch Mortgage Investors, Inc. 2006-RM3 by: Saxon Mortgage Services, Inc. as its attorney-in-fact."³ (Original capitalization and punctuation.)

Quality Loan Service Corporation (Quality), which is not a party to this action, recorded a notice of trustee's sale addressed to Finley on July 12, 2007. On September 7, 2007, Saxon Mortgage Services, Inc. recorded a trustee's deed, executed by Quality, conveying the property to LaSalle. LaSalle then attempted to evict Finley from the premises.

Finley filed her initial verified complaint in this action on September 17, 2008. On May 27, 2009, Finley filed her first amended complaint, which was also verified. It

² In her opening brief on appeal, Finley avers, without citation to the record, that the payment she made in December 2006 represented the amount due for the first three months of 2007. We disregard this unsworn and unsupported statement, which contradicts the verified allegation in the complaint that the December 2006 payment was for "the amount that was due and payable as of" December 21, 2006.

³ All further references to LaSalle are to the assignee named in the assignment of the deed of trust. References to LaSalle Bank are to LaSalle Bank National Association, in its individual corporate capacity.

named as a single defendant “Lasalle [*sic*] Bank National Association, as Trustee and [*sic*] Merrill Lynch Mortgage Investors and [*sic*] Saxon Mortgage Services, Inc[.] as its attorney-in-fact.”⁴ The complaint alleged that the notice of default was recorded in violation of various statutes, and that defendant’s foreclosure efforts were invalid for various reasons, including that defendant was not in physical possession of the original promissory note documenting the mortgage loan, and was not authorized to foreclose on the deed of trust. It also alleged that defendant defrauded Finley by falsely representing to her that she could afford the loan secured by the mortgage, and that the loan agreement was unconscionable because the payments were unreasonably high given Finley’s income, and the terms of the loan were not fully explained to her. The complaint included causes of action for fraud; violation of the federal Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601 et seq.) (RESPA); and violations of Business and Professions Code section 17200 and Civil Code sections 1572, 1788.17, and 2923.6. It sought reformation; a judgment quieting Finley’s title; declaratory and injunctive relief; and compensatory and punitive damages and attorney fees.

On July 1, 2009, LaSalle removed the case to federal court based on Finley’s inclusion in the complaint of causes of action under federal statutes. On October 12, 2009, the federal court entered an order ruling that the only federal cause of action pleaded in the complaint was one for violation of RESPA; dismissing that cause of action for failure to allege sufficient facts to support a RESPA violation; and granting Finley’s motion to remand.

Following the remand, LaSalle filed a demurrer to the complaint. In support of its demurrer, LaSalle requested the trial court to take judicial notice of a number of recorded

⁴ The complaint’s caption and introductory paragraphs name only one defendant, and we construe the quoted language as referring to LaSalle, that is, to the assignee named in the assignment of the deed of trust. The complaint also refers in places to “defendants” (plural) and includes allegations pleaded against Saxon Mortgage Services, Inc. and LaSalle Bank, as if they each were a separately named defendant. Neither LaSalle Bank nor Saxon Mortgage Services, Inc. appeared in its individual capacity in the trial court, however, and neither is a party to this appeal.

documents concerning the property, and of the federal court’s remand order. Finley also requested that the trial court take judicial notice of an order entered by the superior court in the unlawful detainer action against her; certain records that she had subpoenaed; documents showing that Future Awareness had been granted tax-exempt status; and other items not relevant to this appeal. The trial court granted both parties’ requests, but only as to court documents and documents recorded against the property, and with the proviso that the court “does not accept as true factual statements made in those records and documents unless it appears that they are indisputably true.”

On January 26, 2010, the trial court entered an order sustaining LaSalle’s demurrer without leave to amend. Finley attempted to appeal, but this court dismissed the appeal as premature. (*Finley v. LaSalle National Bank Association* (Mar. 30, 2010, A127875 [nonpub. order].) On March 29, 2010, the trial court entered judgment in favor of LaSalle. Finley then filed a timely notice of appeal from that judgment.

DISCUSSION

A. Applicable Principles of Appellate Review

When reviewing an appeal arising from the granting of a demurrer without leave to amend, “[w]e accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. [Citation.] We also accept as true facts which may be inferred from those expressly alleged. [Citation.]” (*In re Electric Refund Cases* (2010) 184 Cal.App.4th 1490, 1500.) We also consider facts that are the proper subject of judicial notice. (See generally *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.)

In addition, on an appeal of this type, “we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demur[r]er, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has

occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

Like any other appellant, Finley has the burden of demonstrating error. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) In order to do so, an appellant must “present argument and authorities on each point to which error is asserted, or else the issue is waived. [Citation.]” (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865; see also *Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 237.) In addition, all factual assertions in an appellant’s brief must be supported by appropriate citations to the record in order for us to consider them. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 816, fn. 5; see also *Belli v. Curtis Pub. Co.* (1972) 25 Cal.App.3d 384, 394, fn. 5.)

B. Contentions on Appeal

Finley challenges the trial court’s ruling on two grounds: first, that the trial court abused its discretion in denying her leave to amend her complaint a second time, and second, that she did, or at least could, plead facts sufficient to state a cause of action for fraud.⁵ Before addressing these arguments, we consider LaSalle’s threshold contention

⁵ Finley is self-represented, and her briefs on appeal are not a model of clarity. Her opening brief does not appear to challenge the trial court’s order insofar as it sustained the demurrer with respect to the causes of action other than fraud. Accordingly, we deem all other challenges to the ruling forfeited, and do not address them, even though LaSalle has done so in its respondent’s brief. (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 [“An appellate brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citation.]”].)

Finley’s reply brief raises additional issues regarding the propriety of the foreclosure sale, but they are not properly before us, for two reasons. First, we need not consider arguments raised for the first time on appeal in the appellant’s reply brief. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Second, the arguments in the reply brief depend on factual averments that are not supported with citations to the record, and thus need not be considered by this court. (*Mueller v. County of Los Angeles, supra*, 176 Cal.App.4th at p. 816, fn. 5.)

that Finley lacks standing to assert any cause of action in the capacity of owner of the property.

1. Standing

LaSalle's standing argument is based on the contention that Finley does not own the property, because she deeded it to Future Awareness shortly after the refinance. This argument is premised on a deed to that effect, which, as noted *ante*, was recorded on April 25, 2006. That deed, of which the trial court took judicial notice at LaSalle's request, appears to contradict the allegation in Finley's verified first amended complaint that she is "and at all times relevant [has] been . . . the lawful owner of" the property.

This appeal, however, cannot be resolved by bootstrapping judicial notice of the deed to Future Awareness into a factual determination, contrary to the allegations of the complaint, that Finley does not own the property. "A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. [Citation.] Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable. [Citation.] . . . 'In ruling on a demurrer, a court may consider facts of which it has taken judicial notice. [Citation.] This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]' [Citation.] ¶ . . . 'Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. [Citation.] On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citation.] 'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.'" [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.]' . . . ' "[J]udicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be

judicially noticed.” [Citation.]’ ” ’ ” (*Fremont Indemnity Co. v. Fremont General Corp.*, *supra*, 148 Cal.App.4th at pp. 113-114, italics omitted.)

Moreover, the apparent contradiction between the allegations in the complaint, and the existence of the deed, is susceptible of a resolution in Finley’s favor. The deed means, at most, that Future Awareness owned the property for some unspecified period of time; it does not preclude the possibility that Future Awareness deeded the property back to LaSalle, or that Finley reacquired ownership in some other way. LaSalle did not present the trial court with any judicially noticeable evidence that Future Awareness *remained* the owner of the property *at the time of the foreclosure sale*. Given the principles governing our review of an order sustaining a demurrer, we must accept the averments of the complaint as true for purposes of this appeal. Thus, we will proceed on the assumption that Finley has standing to challenge the foreclosure.

2. Cause of Action for Fraud

As already noted, the recorded document (the assignment) that assigned the deed of trust from Finley’s original lender, Resmae, to LaSalle names the assignee as “LaSalle Bank National Association, as Trustee and Custodian for Merrill Lynch Mortgage Investors, Inc. 2006-RM3 by: Saxon Mortgage Services, Inc. as its attorney-in-fact.” (Original capitalization and punctuation.) As best as we can determine from Finley’s opening brief, she appears to contend that her complaint states a cause of action for fraud based on the contention that the assignment was misleading in that it actually assigned the deed of trust to more than one separate entity. Based on this assertion, Finley appears to contend that LaSalle Bank is not a bona fide purchaser of the property, because the other entities to which the deed of trust was assigned did not participate in the foreclosure sale.

Finley’s argument is based on a confusion stemming from the admittedly complex name of the assignee of the deed of trust. As we read the assignment, it was not made to three separate and distinct entities, i.e., LaSalle Bank, Merrill Lynch, and Saxon Mortgage. Rather, it was made to LaSalle Bank, *acting through* its attorney-in-fact, Saxon Mortgage Services, Inc., and *in its capacity as* trustee and custodian for a

corporation bearing the name “Merrill Lynch Mortgage Investors, Inc. 2006-RM3.” Thus, contrary to Finley’s contention, the effect of the assignment was to name a single entity – LaSalle – as the successor beneficiary of the deed of trust. This is the same entity that was named as the grantee in the trustee’s deed issued as a result of the foreclosure sale, and that, as a result, now claims ownership of the property.

In short, nothing in Finley’s brief convinces us that her complaint stated a cause of action based on some fraud or other irregularity, either in the assignment of Finley’s deed of trust to LaSalle, or in the foreclosure sale by which LaSalle acquired title to the property.

3. Denial of Leave to Amend

Before the hearing on LaSalle’s demurrer, Finley subpoenaed certain documents, which the trial court’s records showed were received by the court, but which the trial judge was not able to locate at the time of the hearing. Finley now contends, based on the missing documents and on the trial court’s having “restrained” her “from arguing relevant points” at the hearing, that the trial court should not have sustained the demurrer without permitting her to amend her complaint.

Finley correctly notes that it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows that there is a reasonable possibility the defects in the complaint can be cured by amendment. (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 970-971.) Nonetheless, “ ‘the burden is on the plaintiff to demonstrate that the trial court abused its discretion’ ” by “show[ing] in what manner [s]he can amend h[er] complaint and how that amendment will change the legal effect of h[er] pleading. [Citation.]’ [Citation.]” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) “ ‘To meet this burden, a plaintiff must . . . on appeal, enumerate the facts and demonstrate how those facts establish a cause of action.’ [Citation.]” (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166.)

Such a showing may be made for the first time on appeal. (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) Even so, “[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains

with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]” (*Id.* at p. 44.) “The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]” (*Id.* at pp. 43-44.)

Thus, even if the trial court erred in failing to permit Finley to explain specifically what the missing documents contained, and what amendments she was prepared to make to the complaint, the burden remains on her to offer such an explanation in her brief on appeal, and to demonstrate how her proposed amendments to the complaint would cure the defects identified by LaSalle’s demurrer. Finley has not done so.⁶ Accordingly, we find no abuse of discretion in the trial court’s denial of leave to amend.

DISPOSITION

The judgment is affirmed. In the interests of justice, the parties shall each bear their own costs on appeal.

⁶ Finley requested that this court take judicial notice of various documents on appeal. We granted her request on July 16, 2010, pending a determination as to their relevance. Having examined the documents, we have determined that they are not relevant to the legal issues presented by this appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.

A128223, *Finley v. LaSalle National Bank Assn.*